

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KEINO CHRICHLOW,	§
	§ No. 34, 2012
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr. ID No. 0611011396
	§
Plaintiff Below-	§
Appellee.	§

Submitted: June 8, 2012

Decided: July 30, 2012

Before **STEELE**, Chief Justice, **HOLLAND** and **RIDGELY**, Justices

ORDER

This 30th day of July 2012, upon consideration of the briefs of the parties and the record below, it appears to the Court that:

(1) The defendant-appellant, Keino Chrichlow, filed an appeal from the Superior Court’s December 28, 2011 order denying his first motion for postconviction relief pursuant to Superior Court Criminal Rule 61.¹ We find no merit to the appeal. Accordingly, we affirm.

¹ Because Chrichlow’s first postconviction motion contained allegations of ineffective assistance of counsel, the Superior Court requested that Chrichlow’s trial counsel file an affidavit responding to the allegations. *Horne v. State*, 887 A.2d 973, 975 (Del. 2005); Super. Ct. Crim. R. 61(g) (1) and (2).

(2) The record reflects that, in June 2007, Chrichlow was found guilty by a Superior Court jury of sixteen counts of Robbery in the First Degree, two counts of Possession of a Firearm During the Commission of a Felony and one count of Conspiracy in the Second Degree. In October 2007, the Superior Court granted Chrichlow's motion for judgment of acquittal, in part, reducing nine of the convictions of Robbery in the First Degree to convictions of Aggravated Menacing.² Following reduction of those convictions, the Superior Court sentenced Chrichlow to a total of twenty-one years of Level V incarceration.

(3) In this appeal from the Superior Court's denial of his first postconviction motion, Chrichlow asserts three claims, as follows: a) his trial counsel provided ineffective assistance by failing to request an accomplice "level of liability" jury instruction pursuant to Del. Code Ann. tit. 11, §274; b) his appellate counsel provided ineffective assistance by failing to raise trial counsel's failure to request such an instruction as an issue on appeal; and c) his constitutional rights to a fair trial and due process were violated by trial counsel's error and the Superior Court's denial of his postconviction motion. All three of Chrichlow's claims hinge on his core

² The State filed an unsuccessful appeal challenging the Superior Court's reduction of the robbery convictions to aggravated menacing convictions. This Court affirmed the Superior Court's judgment on appeal. *State v. Bridgers*, 988 A.2d 939 (Del. Super 2007), *aff'd* 970 A.2d 257 (Del. 2009).

contention that he was entitled to, but did not receive, the proper jury instruction on accomplice liability.³

(4) The record in this case reflects that Chrichlow was prosecuted as an accomplice to a bank robbery that took place in November 2006 at the PNC Bank located on Basin Road in New Castle County, Delaware.⁴ The State presented evidence at trial that Chrichlow was the designated getaway driver for the robbery. The record also reflects that Chrichlow's counsel did not request, and Chrichlow did not receive, a jury instruction pursuant to §274.⁵ Instead, counsel took the position throughout the trial that Chrichlow's "mere presence" at the scene of the crime was insufficient under the accomplice liability statute to support a conviction.

(5) Chrichlow has asserted claims of ineffective assistance against both his trial counsel and his appellate counsel. In order to prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel's representation fell below an objective standard of reasonableness and that, but for his counsel's unprofessional errors, there is

³ To the extent that Chrichlow presented claims in the Superior Court that he does not pursue in this appeal, all such claims are deemed to be waived and will not be considered in this proceeding. *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993).

⁴ Del. Code Ann. tit. 11, §271.

⁵ *Allen v. State*, 970 A.2d 203, 210, 213-14 (Del. 2009) ("... [w]hen an offense is divided into degrees, each participant is only guilty for the degree of a crime that is commensurate with their own mental culpability *and* their own accountability for an aggravating circumstance.")

a reasonable probability that the outcome of the proceedings would have been different.⁶ Although not insurmountable, the Strickland standard is highly demanding and leads to a strong presumption that the representation was professionally reasonable.⁷

(6) The record before us supports the conclusion that Chrichlow’s trial counsel made a conscious, as well as professionally reasonable, decision to take an “all or nothing” approach to his defense of Chrichlow, arguing for a complete acquittal. As the Superior Court noted, the State did not focus its case on Chrichlow, but concentrated its efforts on Chrichlow’s two accomplices. Chrichlow’s counsel chose to take advantage of that fact. Moreover, drawing attention to his client’s level of participation in the crime entailed the risk that Chrichlow’s arrest for armed robbery in Maryland would become an issue at the trial in Delaware. As his affidavit reflects, Chrichlow’s counsel chose to advance the theory that Chrichlow was present at the scene of the crime, but did not participate. Pursuing an accomplice “level of liability” jury instruction would have undermined that approach and weakened his case. Based on all of the above, we conclude that Chrichlow has failed to demonstrate either that his counsel erred, much less that any action on his counsel’s part prejudiced him.

⁶ *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

⁷ *Flamer v. State*, 585 A.2d 736, 753 (Del. 1990).

(7) Chrichlow also argues that his appellate counsel provided ineffective assistance. While the record reflects that Chrichlow’s appellate counsel erred by failing to file a timely direct appeal by means of a cross-appeal in *State v. Bridgers*, ultimately that error had no prejudicial effect on Chrichlow’s case. In its decision denying Chrichlow’s postconviction claims, the Superior Court concluded that Chrichlow’s one viable claim on direct appeal---that the jury should have been given an accomplice “level of liability” instruction---was without merit.⁸ We agree. Even in situations where §274 is triggered, an “all or nothing” approach can be a viable defense strategy.⁹ The situation that presented itself in this case clearly falls within that category. As such, while appellate counsel erred, Chrichlow suffered no prejudice as a result. Therefore, Chrichlow’s claim of ineffective assistance on the part of his appellate counsel fails.

(8) Chrichlow’s third, and final, claim is that his constitutional rights to a fair trial and due process were violated by his trial counsel’s error and the Superior Court’s denial of his postconviction motion. In the absence of any support for Chrichlow’s claim of professional error on the part of his trial counsel or any basis for his claim of error on the part of the Superior

⁸ The Superior Court decided, in the interest of efficiency, to simply rule on that claim within the context of his postconviction motion rather than re-sentencing him. *Middlebrook v. State*, 815 A.2d 739, 743 (Del. 2003).

⁹ *Dickinson v. State*, 8 A.3d 1166, 1168-69 (Del. 2010). See also *Robertson v. State*, Del. Supr., No. 602, 2011, Steele, C.J. (Feb. 27, 2012).

Court in denying his postconviction motion, we find Chrichlow's third claim to be without merit.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice